

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
CERTAIN-TEED PRODUCTS CORPORATION

For Appellant: F. J. Coladonato, Tax Department,
 Certain-teed Products Corporation

For Respondent: Burl D. Lack, Chief Counsel;
 Crawford H. Thomas, Associate Tax Counsel

O P I N I O N

This appeal is made pursuant to Section 26077 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of Certain-teed Products Corporation for refund of franchise tax in the amount of \$255.68 for the income year 1953.

On March 3, 1955, Appellant wrote to Respondent Franchise Tax Board explaining that the Internal Revenue Service had disallowed a deduction on its 1951, 1952 and 1953 Federal income tax returns for percentage depletion of "stone." Appellant claimed the depletion deduction on the basis that gypsum qualified as "stone." In the letter it was said that the Federal assessments had been paid but Appellant was "not agreeing with the disallowance and will in due course file claims for refund and if necessary carry the question to the courts."

The next paragraph of the letter read as follows:

In the light of the foregoing and to the extent that percentage depletion is otherwise deductible in computing California income we request, in event a similar disallowance is proposed by California, that we be furnished with the appropriate forms with which to file protective refund claims or otherwise advised of the procedure to be followed to prevent the years involved from being closed by operation of the statute of limitations.

On July 21, 1955, Respondent replied:

In response to . . . the taxpayer's letter of March 3, 1955, it appears that neither a claim nor a protest will benefit the taxpayer for these two years [1951-1952]. The reason is that there

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was no comparable provision for percentage depletion on "stone" for California purposes until the income year ended December 31, 1953. This office will likely follow the Federal action as for 1953 when that year is audited in the future.

On the same date, Respondent issued notices of additional franchise tax proposed to be assessed for the years 1951 and 1952, disallowing the depletion deductions. No protest followed.

Respondent thereafter audited Appellant's return for the income year 1953 and on March 10, 1958 issued its notice of additional franchise tax proposed to be assessed for that year. Appellant protested one of the adjustments but did not protest the disallowance of the depletion deduction. Respondent revised the assessment in accordance with the protest and Appellant paid the tax on August 11, 1958.

Appellant had filed a federal claim for refund for 1951 through 1953, inclusive. The claim was denied and suit brought. Ultimately the Federal Government stipulated that a refund was due because of the holding in United States Gypsum Co. v. United States, 253 F. 2d 738 (1958), that gypsum is stone for percentage depletion purposes. (See also Rev. Rul. 58-593, 1958-2 Cum. Bull. 920..)

On October 29, 1959, therefore, Appellant wrote Respondent that on August 21, 1959, the Federal Government had allowed a refund on the depletion claim for the years 1951, 1952 and 1953, and Appellant sought credit for the 1953 state tax paid attributable to the percentage depletion disallowance.

Respondent advised Appellant, and now contends, that the refund claim was barred by the statute of limitations (Rev. & Tax. Code, § 26073).

Appellant does not deny that its claim would normally be barred but contends that because of the July 1955 letter it was felt that the state would not raise the statute of limitations as a defense.

The issue thus presented is whether Respondent is estopped to invoke the statute of limitations.

Estoppels will not be invoked against the government or its agencies except in rare and unusual circumstances. (Aehli v. Board of Education, '62 Cal. App. 2d 706, 729 [145 P.2d 601]; Donovan v. City of Santa Monica, 88 Cal. App. 2d 386, 394 [199 P.2d 51]). See also, California State Board of Equalization v. Coast Radio Products, 228 F. 2d 520; Market Street Railway Co.

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v. California State Board of Equalization, 137 Cal. App. 2d 87 [290 P.2d 20]; California Cigarette Concessions, Inc. v. City of Los Angeles, 53 Cal. 2d 865 [350 P.2d 715].) In order to create an estoppel against any party, there must be justifiable reliance on his statement. The representation "must be plain, not doubtful or matter of questionable inference.... Certainty is essential to all estoppels." (Orange Cove Water Co. v. Sampson, 78 Cal. App. 334, 347 [248 P. 526]. See also, United States Fidelity & Guaranty Co. v. State Board of Equalization, 47 Cal. 2d 384 [303 P.2d 1034].) The doctrine of equitable estoppel does not erase the duty of due care and is not available for the protection of one who has suffered loss solely by reason of his own failure to act or inquire. (Hampton v. Paramount Pictures Corp., 279 F. 2d 100.)

Respondent's letter said nothing concerning the statute of limitations on refund claims, presumably because it was considered premature to do so. At that time the tax for the year in question had not been assessed or paid. Appellant, moreover, had asked for such information only "in event a ... disallowance [of the depletion deduction] is proposed by California." The disallowance for the year involved was not proposed until almost three years after the correspondence took place. Appellant then paid the tax without protest or other indication that it sought a refund.

Appellant emphasizes the statement in Respondent's letter that "This office will likely follow the Federal action as for 1953 when that year is audited in the future." The Federal action under discussion in the correspondence was the disallowance of the depletion deduction and that was the action which Respondent subsequently followed. We do not regard it as reasonable for Appellant to conclude, without a request for clarification, that "action" meant any future action by the Federal authorities or that "likely" meant definitely.

Pursuant to Section 26073 of the Revenue and Taxation Code, Appellant had until August 11, 1959, one year after the tax was paid, to file a refund claim. Assuming that in a proper case the bar of the statute could be lifted by estoppel, this, in our opinion, is not such a case.

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O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 26077 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Certain-teed Products Corporation for refund of franchise tax in the amount of \$255.68 for the income year 1953, be and the same is hereby sustained.

Done at Sacramento, California, this 28th day of May, 1963,
by the State Board of Equalization.

John W. Lynch, Chairman

Geo. R. Reilly, Member

Alan Cranston, Member

Paul R. Leake, Member

 , Member

ATTLST: Dixwell L. Pierce, Secretary